

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NORMAN GOTCHER, JR.,)
) Case No. 04-2417-TSZ-JPD
Plaintiff,)
)
v.)
) REPORT AND RECOMMENDATION
KEN RAY, *et al.*,)
)
Defendants.)
_____)

I. INTRODUCTION AND SUMMARY CONCLUSION

Plaintiff is proceeding pro se and in forma pauperis in this 42 U.S.C. § 1983 civil-rights action against seventeen current and former employees of the King County Correctional Facility. He alleges that defendants violated his civil rights by beating him, failing to provide adequate notice of an administrative hearing before sending him to disciplinary segregation, failing to provide adequate medical care, and lying to cover up these alleged violations.

Defendants deny they violated plaintiff's civil rights and have filed a motion for summary judgment. Dkt. No. 81. Plaintiff has filed a fifty-one-page memorandum opposing summary judgment. Dkt. No. 118. Having carefully reviewed the parties' papers, supporting materials, and the available record, the Court recommends that defendants' motion for summary judgment be GRANTED IN PART and DENIED IN PART. With the exception of Sergeant Stewart, all defendants are entitled to summary judgment on all claims. Plaintiff's

claims against Sergeant Stewart should proceed and counsel should be appointed on plaintiff's behalf.

II. BACKGROUND

Plaintiff is a state prisoner who is currently incarcerated at the Monroe Corrections Complex in Monroe, Washington. This litigation, however, concerns violations of his civil rights, which allegedly occurred while he was held as a pretrial detainee at the King County Correctional Facility in Seattle, Washington (the "Jail"), between January 21, 2004, and June 4, 2004. Dkt. No. 102, Deposition of Norman Gotcher, April 27, 2004, (Gotcher Dep.) at 42-43. Plaintiff's complaint seeks various combinations of monetary damages and declaratory and injunctive relief for a variety of claims against seventeen current and former Jail employees.

A. Events in Plaintiff's Cell and While Being Transported to Segregation.

On January 21, 2004, Officer Kristina Hagman booked plaintiff into the Jail. Dkt. No. 82, Hagman Decl. at ¶ 4. During booking, a dispute arose between plaintiff and Officer Hagman regarding the manner in which plaintiff's personal property was inventoried. *Id.*; Gotcher Dep. at 45. Plaintiff claims that, after booking, Officer Michelle Helpenstell called him a "nigger" and then escorted him to a holding cell, where he vented his frustration at being jailed by yelling, kicking the toilet, and referring to corrections officers as, among other things, "bastards[.]" Dkt. No. 26, Complaint at ¶ 23; Gotcher Dep. at 44-48; Hagman Decl. at ¶ 5; Dkt. No. 83, Helpenstell Decl. at ¶ 5; Dkt. No. 118, Pl. Opp. to Sum. J. at 18-19. Officer Helpenstell determined that these actions violated Jail rules and wrote plaintiff an infraction for the incident. Helpenstell Decl. at ¶ 6, Attach. A; Gotcher Dep. at 48. She then determined that plaintiff needed to be moved to administrative segregation pending a hearing on the infraction. Helpenstell Decl. at ¶ 6.

Officer Helpenstell directed plaintiff to turn away from her so that he could be handcuffed for the move. Helpenstell Decl. at ¶ 7. The parties disagree as to precisely what occurred next. Plaintiff did not "want [Officer Helpenstell] touching [him], period," and he

01 told this to Officer Helpenstell. Gotcher Dep. at 58. According to plaintiff, Officer Helpenstell
 02 and three to four other officers then grabbed him without warning, and handcuffed him.¹
 03 Complaint at ¶ 27-28; Gotcher Dep. at 48-49. His complaint alleges that while handcuffed,
 04 Officers Hagman and Taylor hoisted him off the ground by his handcuffs and, together with
 05 Officer Weaver, “constantly kneed” him on his back and ribs. *Id.* at ¶ 29-31. His complaint
 06 further alleges that Officer Weaver applied a choke-hold to him, and that she and Officers
 07 Hagman, Taylor, and Weaver repeatedly slammed him into the cell wall. *Id.* at ¶ 15, 32-33;
 08 Dkt. No. 77, Second Amended Complaint at 4-5.

09 Plaintiff’s complaint also alleges that Sergeant Stewart pepper-sprayed him during the
 10 struggle, left his cell and rubbed “something” on his hand, and then ran back into his cell and
 11 slammed plaintiff’s head with “brutal force.” Complaint at ¶ 34-35. According to plaintiff, the
 12 officers continued to kick and slap him while they laughed and made statements such as they
 13 “bet [plaintiff would] be good now.” *Id.* at ¶ 37. Plaintiff was given a second infraction for
 14 this incident. Helpenstell Decl. at ¶ 10-12.

15 Plaintiff also alleges that, while Officers Helpenstell, Taylor, Hagman, and Sergeant
 16 Stewart transported him to administrative segregation, they slammed him into the elevator wall
 17 and continued to taunt him with statements such as, “[w]e can all die in this elevator if this is
 18 what he wants.” Complaint at ¶ 41. They then threw him into a cell with “severe pain, . . . a
 19 busted lip, . . . severe headach[e] and burning [eyes.]” *Id.* at ¶ 42. Plaintiff’s complaint states
 20 that he never resisted or threatened the officers in any way.² *Id.* at ¶ 36-37.

21 B. Administrative Hearing and Appeal.

22
 23 ¹It is not clear whether all of the named officers actually entered his cell. Plaintiff’s
 24 initial complaint indicates that all five officers did so. Complaint at ¶ 27-28. At his deposition,
 25 however, he stated that “three or four different” officers were involved. Gotcher Dep. at 48-
 26 49. Additionally, Officer Hagman’s declaration indicates that she was not involved with
 plaintiff after he left the booking counter, and thus did not enter his cell. Hagman Decl. at ¶
 4-6.

²*But see infra*, Discussion Section C.2.

01 On January 25, 2004, an administrative hearing was held at the Jail before Classification
02 Program Specialist Vicki Shumaker to address the two infractions issued in connection with
03 the January 21, 2004, incident. Dkt. No. 87, Shumaker Decl.” at ¶ 4; Gotcher Dep. at 65-68,
04 204-07. According to plaintiff’s complaint, he was never given twenty-four- hour advance
05 notice of the hearing. Complaint at ¶ 44-53. Nevertheless, Specialist Shumaker found plaintiff
06 guilty of the two infractions and sentenced him to disciplinary segregation for approximately
07 thirteen days. Shumaker Decl. at ¶ 4, Attachs. A, B; Dkt. No. 88, Declaration of McKeon
08 Decl. at ¶ 4. Plaintiff appealed but, after reviewing the record, Classification Program
09 Supervisor James McKeon affirmed both of Ms. Shumaker’s decisions. Gotcher Dep. at 67-
10 68, Exs. 7, 8; McKeon Decl. at ¶ 4, Attachs. A, B.

11 C. Medical Treatment and Requests for a Medical Transfer.

12 Plaintiff also raises a variety of Eighth Amendment claims against Jail officials and
13 medical staff for their alleged failure to provide him with adequate medical care. He argues
14 that no one gave him care after the alleged beating and that when he was treated, Dr. Ben
15 Sanders performed a perfunctory examination only. Complaint at ¶ 58-60; *see also* Dkt.
16 No. 60, First Amended Complaint. Plaintiff also alleges that nurses Nicki Behner, Cathy
17 Barber, Carol Sinape and Barbara Krzyzek interfered with and delayed his access to
18 appropriate care outside the Jail. Complaint at ¶ 80-87, 91. As a result, plaintiff alleges that
19 his injuries became “more severe and life lasting[.]” *Id.* at ¶ 91.

20 In addition, plaintiff argues that former Jail director Kenneth Ray, Mike Velasquez, Dr.
21 Alonzo Plough, former Director of Seattle-King County Department of Public Health, Nurse
22 Andrew Murphy, and Medical Director Barbara Hanson knew about his injuries, but failed to
23 order that he be transferred to Harborview to receive the treatment he believed he needed.
24 Complaint at ¶ 14-16, 69-76, 80-87. He argues that these defendants should have known
25 about his alleged ailments, but that they failed to respond to his complaints or take any action
26 to assist him. *Id.* Plaintiff also appears to argue that Messrs. Murphy and Velasquez ignored

his requests for a transfer and lied to the King County Ombudsman to cover up the Jail's failure to order the medical transfer. *Id.* at ¶¶ 69-72.

III. DISCUSSION

A. Summary Judgment Standard.

Summary judgment is appropriate when, viewing the evidence in the light most favorable to the nonmoving party, there exists "no genuine issue as to any material fact" such that "the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A material fact is a fact relevant to the outcome of the pending action. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Genuine issues of material fact exist when the evidence would enable "a reasonable jury . . . [to] return a verdict for the nonmoving party." *Id.* (internal citations omitted). In response to a properly supported summary judgment motion, the nonmoving party may not rest upon mere allegations or denials in the pleadings, but must set forth specific facts demonstrating a genuine issue of fact for trial and produce evidence sufficient to establish the existence of the elements essential to his case. *See* Fed. R. Civ. P. 56(e); *Celotex Corp. v. Cattrett*, 477 U.S. 317, 323 (1986). A mere scintilla of evidence, however, is insufficient to create a factual dispute. *See Anderson*, 477 U.S. at 252.

When analyzing a pro se litigant's motion for summary judgment, the Court must consider as evidence "all of [a plaintiff's] contentions offered in motions and pleadings, where such contentions are based on personal knowledge and set forth facts that would be admissible in evidence, and where [the plaintiff] attested under penalty of perjury that the contents of the motions or pleadings are true and correct." *Jones v. Blanas*, 393 F.3d 918, 923 (9th Cir. 2004) (collecting cases). However, a litigant cannot create an issue of fact by contradicting himself in subsequent sworn statements. *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 266 (9th Cir. 1991). If the Court finds that any such contradiction is a "sham" and not "an honest discrepancy, a mistake, or the result of newly discovered evidence," it may disregard the sham evidence. *Id.* at 266-67.

01 B. Qualified Immunity Standard.

02 Public officials who perform discretionary functions enjoy qualified immunity in a civil
03 action for damages, provided that his or her conduct does not violate clearly established federal
04 statutory or constitutional rights of which a reasonable person would have known. *Harlow v.*
05 *Fitzgerald*, 457 U.S. 800, 818 (1982). Thus, qualified immunity “provides ample protection to
06 all but the plainly incompetent or those who knowingly violate the law.” *Burns v. Reed*, 500
07 U.S. 478, 480 (1991).

08 The Supreme Court has established a two-part test for determining whether an official
09 is entitled to qualified immunity. First, the Court must determine whether the facts, when
10 taken in the light most favorable to the plaintiff, demonstrate that the defendant’s conduct
11 violated a constitutional right. *Saucier v. Katz*, 533 U.S. 194, 201 (2001); *Cruz v. Kauai*
12 *County*, 279 F.3d 1064, 1068-69 (9th Cir. 2002). If a violation is articulated, the Court must
13 ascertain whether the constitutional right at issue was “clearly established” at the time of the
14 alleged violation. *Saucier*, 533 U.S. at 201; *Cruz*, 279 F.3d at 1069. The right must be
15 established at more than some abstract level. *Saucier*, 533 U.S. at 201. Rather, “[t]he contours
16 of the right must be sufficiently clear that a reasonable official would understand that what he is
17 doing violates that right.” *Id.* at 202 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640
18 (1987)); *see also Cruz*, 279 F.3d at 1069.

19 C. Claims Against Officers Hagman, Helpenstell, Taylor, and Weaver
20 Should Be Dismissed.

21 The Due Process clause protects pretrial detainees from uses of excessive force that
22 amount to punishment. *Gibson v. County of Washoe Nevada*, 290 F.3d 1175, 1197 (9th Cir.
23 2002) (citing *Graham v. Connor*, 490 U.S. 386, 395 n.10 (1989)). The Fourth Amendment
24 sets the “applicable constitutional limitations” for purposes of analyzing excessive-force claims
25 by pretrial detainees. *Id.* (citing *Pierce v. Multnomah County*, 76 F.3d 1032, 1043 (9th Cir.
26 1996)). Excessive-force claims by pretrial detainees turn on whether the officers’ use of force
was objectively reasonable, given the circumstances. *Graham*, 490 U.S. at 397.

To determine whether the officers' use of force was reasonable, the Court must carefully balance "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake." *Id.* at 396. It may consider factors such as whether a detainee posed a threat to the safety of the officers or others,³ *Id.* at 396, and whether there is any objective medical evidence of an injury. *See Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912 (9th Cir. 2001) (conclusory allegations of injury without factual data or medical evidence insufficient to defeat summary judgment motion in excessive force claim); *cf. Hudson v. McMillian*, 503 U.S. 1, 9-10 (indicating that blows which caused bruises, swelling, and loosened teeth were not de minimis). The Court's analysis also must be cognizant of the fact that prison officials must be free to take action to ensure the safety of themselves and other inmates, and to ensure security and order within the prison. *Bell v. Wolfish*, 441 U.S. 520, 546-47 (1979). In the context of Fourth Amendment excessive-force cases, the qualified-immunity analysis is the same as an analysis on the merits. *Scott v. Henrich*, 39 F.3d 912, 914 (9th Cir. 1994) (internal citation omitted).

1. Officer Kristina Hagman is Entitled to Summary Judgment.

Plaintiff has failed to demonstrate the existence of a genuine issue of material fact as to Officer Hagman. Plaintiff's complaint indicated Officer Hagman was one of the officers who entered his cell and beat him. Complaint at 28-31. However, Officer Hagman has offered a declaration in support of summary judgment that indicates she did not enter plaintiff's cell, and that her interaction with plaintiff was limited to a brief verbal dispute with him during booking. *See generally* Hagman Decl.

Plaintiff's deposition testimony and opposition to summary judgment contradict his complaint and support Officer Hagman's motion for summary judgment. In his deposition,

³In the context of arrest, other factors include "the severity of the crime at issue, . . . and whether he [wa]s actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396.

01 plaintiff offered no testimony as to how Officer Hagman had any involvement with plaintiff
02 after booking or that she participated in the alleged beating in any way. Gotcher Dep. at 43,
03 121-22. Moreover, plaintiff conceded in his opposition to summary judgment that his only
04 interaction with Officer Hagman was in connection with his booking. Pl. Opp. to Sum. J. at 3,
05 21. He has alleged no constitutional tort during booking. Plaintiff's contradictory statements
06 indicate his initial allegation was a sham and does not create a genuine issue of material fact as
07 to Officer Hagman. *Kennedy*, 952 F.2d at 266-67. Any claims against office Hagman should
08 therefore be dismissed.

09 2. Officer Michelle Helpenstell is Entitled to Summary Judgment.

10 Plaintiff claims that Officer Helpenstell violated his civil rights by calling him a "nigger"
11 and using other derogatory and threatening language. The Court does not condone such
12 conduct, if it in fact occurred.⁴ However, threats and verbal harassment generally do not state
13 a claim under 42 U.S.C. § 1983. *See Gaut v. Sunn*, 810 F.2d 923, 925 (9th Cir. 1987).

14 Additionally, plaintiff has not carried his burden of demonstrating the existence of a
15 genuine issue of material fact as to his excessive-force claims against Officer Helpenstell.
16 Officer Helpenstell has offered a declaration that indicates plaintiff had "shown himself to be a
17 problem" by swearing at her, refusing her orders and resisting handcuffing. Helpenstell Decl.
18 at ¶ 6-8. She has also stated that plaintiff was not "choked, slammed, kneed, or yanked up in
19 the air by his wrists once he was handcuffed." *Id.* at ¶ 9.

20 Although plaintiff denies that he threatened, struck, or otherwise resisted the officers,
21 he has contradicted these assertions repeatedly. For instance, plaintiff admits that after his
22 dispute with Officer Hagman, he was escorted to a cell where he yelled, kicked the toilet, and
23 referred to the officers as, among other things, "bastards[.]" Gotcher Dep. at 44-48. He also
24 admits he directed a "fuck you bitch" and similar language towards Officer Helpenstell. Opp.
25 to Sum. J. at 20, 23, 49. He has also acknowledged that he "did not jump to Officer
26

⁴Officer Helpenstell denies using such language. Helpenstell Decl. at ¶ 5.

01 Helpenstell's orders[.]" Opp. to Sum. J. at 34, he told the officers he did not want Officer
02 Helpenstell to touch him, Gotcher Dep. at 49, 57-58, and he struggled against the officers as
03 they attempted to handcuff him. Opp. to Sum. J. at 5-6, 8, 20-22; Gotcher Dep. at 50-52,
04 57-58. Plaintiff cannot create a issue of fact by repeatedly contradicting himself within and
05 among his sworn statements. *Kennedy*, 952 F.2d at 266-67. Taking the facts in the light most
06 favorable to plaintiff, Officer Helpenstell could have reasonably believed that plaintiff's agitated
07 and obstreperous behavior presented a threat to both the order in the Jail and to her own safety
08 and that it was necessary for her and the other officers assisting her in handcuffing and
09 transporting plaintiff to use force.

10 The fact that plaintiff sustained no documented physical injury of any consequence
11 indicates Officer Helpenstell's use of force was reasonable. Although plaintiff claims he
12 received no medical care until approximately thirty days after the incident, he has contradicted
13 this assertion as well. Aff. In Support of Opp. to Sum. J. at 3. Medical records from
14 January 26, 2004, show Nurse Jimmy Andrews conducted an examination that revealed "[no]
15 bruising or swelling or any other visible injury on [plaintiff's] wrists," nor any injuries to his
16 eyes. Dkt. No. 90, Andrews Decl. at ¶ 4, Attach. Plaintiff indicated to Nurse Andrews that he
17 did not have "that much pain," and he refused over-the-counter pain medication. *Id.* at Attach.
18 An exam by Dr. Sanders on February 4, 2004, similarly "revealed no acute abnormalities in
19 [plaintiff's] eyes[.]" nor any other injuries that warranted treatment. Dkt. No. 91, Sanders
20 Decl. at ¶ 7. More recently, a July 20, 2004, eye examination at Harborview revealed that
21 plaintiff's eyes were "essentially normal[.]"⁵ Dkt. No. 117, Second Declaration of Legin Davor
22

23 ⁵Plaintiff has submitted a July 22, 2004, letter from Harborview that indicates an
24 examining physician had concerns about plaintiff's retina and that he was scheduled for a
25 second appointment on July 28, 2004. Opp. to Sum. J. at Ex. 47. This letter concerns an
26 examination six months after the incident and offers no opinion as to the precise nature or
cause of the condition. *Id.* It is therefore insufficient to rebut defendants' motion. It also
supports defendants' motion as it applies to plaintiff's medical claims because it demonstrates
defendants had in fact scheduled plaintiff for outside care at Harborview. *See infra* §§ I and J.

01 at 226. Together with the fact that the incident lasted approximately one minute, Helpenstell
02 Decl. at ¶ 9, the medical evidence submitted indicates the force used by Officer Helpenstell was
03 reasonable in light of plaintiff's actions. Summary judgment should therefore be granted.

04 3. Officer Michael Taylor is Entitled to Summary Judgment.

05 Officer Taylor is entitled to summary judgment. Plaintiff has alleged that after he had
06 been handcuffed, Officer Taylor kneed him in his back and yanked him off the ground.
07 Complaint at 29-33, 41-43; Gotcher Dep. at 128-30. He also alleges that Officer Taylor
08 continued to rough him up and make veiled threats against him on the way to segregation.
09 Complaint at 41; Gotcher Dep. at 125-30.

10 In his declaration in support of summary judgment, Officer Taylor has stated that he
11 has no recollection of the incident with plaintiff. Dkt. No. 86, Taylor Decl. at ¶ 4. He has
12 indicated, however, that he would recall if "any officers choked, slapped, kneed, threatened,"
13 or committed the other acts alleged by plaintiff. *Id.* at ¶ 5. He has unequivocally stated that
14 "[t]hese events did not occur." *Id.* Although plaintiff's opposition questions the reliability of
15 Officer Taylor's memory, it does not rebut his affidavit and offers no evidence as to how
16 Officer Taylor violated his civil rights. In response to a properly supported summary judgment
17 motion, the nonmoving party may not rest upon mere allegations or denials in the pleadings,
18 but must set forth specific facts demonstrating a genuine issue of fact for trial, and produce
19 evidence sufficient to establish the existence of the elements essential to his case. *Celotex*, 477
20 U.S. at 323 (1986). Plaintiff has failed to adduce evidence sufficient to defeat Officer Taylor's
21 motion for summary judgment.

22 4. Officer Randy Weaver is Entitled to Summary Judgment.

23 In his complaint, plaintiff has alleged that Officer Weaver participated in violating his
24 civil rights by, among other things, kneeling him and slamming him into a cell wall after he had
25 been handcuffed. Complaint at ¶ 29-31. He further alleges that Officer Weaver applied a
26 choke-hold to him. *Id.* at ¶ 32-33; Second Amended Complaint at 4-5. Officer Weaver has

01 offered a declaration, which indicates that neither he, nor the other officers “choked, slapped,
02 kneed, threatened or tossed plaintiff, or yanked his cuffed arms up from behind.” Dkt. No. 85,
03 Weaver Decl. at ¶ 5-6. Plaintiff did not address this allegation at his deposition⁶ and, other
04 than to generally impugn Officer Weaver’s credibility, has offered no evidence against Officer
05 Weaver’s declaration and motion for summary judgment. As discussed above, a party may not
06 rely simply upon allegations in pleadings to resist a motion for summary judgment. Claims
07 against Officer Weaver should therefore be dismissed.

08 D. Genuine Issues of Material Fact Exist That Preclude Summary Judgment
09 as to Sergeant Stewart.

10 According to plaintiff, Sergeant Stewart left his cell after plaintiff had been handcuffed,
11 sprayed pepper foam into his hand, rushed back into the cell, and violently struck plaintiff’s
12 face, knocking his head against the wall. Complaint at ¶ 34-35. Sergeant Stewart admits that
13 he “applied one short burst” of pepper foam, but denies that he sprayed anything in his hand
14 and slammed it in plaintiff’s face. Dkt. No. 84, Stewart Decl. at ¶ 5. He also denies that he or
15 any other officer “choked, slammed, slapped or kneed, or yanked [plaintiff] up in the air by his
16 wrists once he was handcuffed.” *Id.*; Helpenstell Decl. at ¶ 8; Taylor Decl. at ¶ 5.

17 Unlike plaintiff’s excessive-force claims against the other officers, plaintiff has
18 presented evidence sufficient to raise a genuine issue of material fact as to Sergeant Stewart.
19 In his deposition, plaintiff consistently reiterated his claim against Officer Stewart and has done
20 so again in his opposition to the defendants’ motion for summary judgment. Opp. to Sum. J. at
21 34; Dkt. No.118, Attach 1, Affidavit In Supp. of Sum. J. at 3; Gotcher Dep. at 134-35.
22 Finding that a genuine issue of material fact exists does not equate to a finding that Sergeant
23 Stewart did, in fact, engage in the activity he is alleged to have committed. However, even if
24 plaintiff had been disruptive and had struggled against the officers, slamming pepper foam into
25 plaintiff’s face after he had already been pepper-sprayed, subdued, and handcuffed cannot be

26 ⁶Plaintiff did indicate that Officers Helpenstell, Hagman, Taylor, and Stewart were not responsible for choking him. Gotcher Dep. at 136.

01 said to be reasonable. Rather, such action, if true, is one of the “[g]ratuitous and completely
02 unnecessary acts of violence . . . [that] violate the Fourth Amendment . . . [even without]
03 serious or permanent injury [as] a prerequisite[.]” *Fontana v. Haskin*, 262 F.3d 871, 880 (9th
04 Cir. 2001). In light of the fact that both parties have submitted contradictory evidence as to
05 whether this occurred, summary judgment should not be granted.

06 E. The Disciplinary Hearing Claims Should be Dismissed.

07 Plaintiff claims that Ms. Shumaker violated his due process rights by failing to give him
08 at least twenty-four-hours’ notice that he would have a disciplinary hearing to determine
09 whether to place him in disciplinary segregation. Complaint at ¶¶ 44, 48-51. He further argues
10 that Mr. McKeon violated his due process rights by affirming Ms. Shumaker’s decision. *Id.* at
11 ¶¶ 46-47, 52. These defendants, however, are entitled to summary judgment on the basis of
12 qualified immunity.

13 Pretrial detainees must be given at least twenty-four hours’ written notice of charges
14 pending against them before a hearing can be held to impose disciplinary action. *Wolff v.*
15 *McDonnell*, 418 U.S. 539, 564 (1974); *see also Mitchell v. Dupnik*, 75 F.3d 517, 525 (9th Cir.
16 1996) (noting that *Wolff* sets forth the due process elements of prison disciplinary
17 proceedings). Here, plaintiff has indicated in his complaint, deposition, and response to
18 summary judgment that he was not given twenty-four-hour notice of the proceeding. Hence,
19 taking the facts in plaintiff’s complaint in the light most favorable to him, he has articulated a
20 violation of his due process rights.

21 Plaintiff, however, has not shown that Ms. Shumaker and Mr. McKeon knew or should
22 have known that their actions violated plaintiff’s constitutional rights. According to
23 Ms. Shumaker, plaintiff told her at his disciplinary hearing that he had received twenty-four-
24 hour notice of the hearing. Shumaker Decl. at ¶ 5. Even if plaintiff actually had less than
25 twenty-four hours’ notice, as alleged, plaintiff signed a form at the hearing, which indicates he
26 “received cop[ies] of the infraction[s and] 24 hrs. to prepare for the hearing.” *Id.* at Attachs.

01 A, B. Officer Helpenstell's infraction report also indicates that it was delivered to plaintiff the
 02 day of the incident. *Id.* at Attach A. Ms. Shumaker's good-faith reliance on this evidence to
 03 render her decision was therefore reasonable and she is entitled to qualified immunity regarding
 04 this claim.

05 Mr. McKeon's actions were also reasonable. Mr. McKeon reviewed Ms. Shumaker's
 06 decision, the infraction reports, as well as the forms on which plaintiff acknowledged receipt of
 07 the charges at least twenty-four hours in advance. McKeon Decl. at ¶ 4. Although plaintiff
 08 argued to Mr. McKeon that he had not had such notice, in light of the foregoing facts, Mr.
 09 McKeon's conclusion to the contrary cannot be said to be unreasonable. Plaintiff's claim
 10 against Mr. McKeon should also be dismissed on the basis of qualified immunity.⁷

11 F. Claims Against the Nurses Should Be Dismissed.

12 Plaintiff alleges that nurses Nicki Behner, Cathy Barber, Carol Sinape, and Barbara
 13 Krzyzek violated his Eighth Amendment rights by interfering with and delaying his access to
 14 health care outside the Jail. Complaint at ¶ 77-91. As a result, plaintiff alleges that his injuries
 15 became "more severe and life lasting[.]" *Id.* at ¶ 91. Defendants deny they rendered
 16 inadequate care and argue that they are entitled to summary judgment on the grounds of
 17 qualified immunity. Mtn. for Sum. J. at 15-17.

18 The Due Process clause affords pretrial detainees at least the same level of medical care
 19 as that required by the Eighth Amendment. *Gibson*, 290 F.3d at 1187. Denial, delay of, or
 20 interference with access to medical treatment can constitute "deliberate indifference" in
 21 violation of the Eighth Amendment. *Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000) (en
 22 banc); *see also Toussaint v. McCarthy*, 801 F.2d 1080, 1111 (9th Cir. 1986) (citing *Estelle v.*

23
 24
 25 ⁷In his response to defendants' motion for summary judgment, plaintiff raises new
 26 arguments, including that his hearings should have been taped and that he was prevented from
 calling witnesses. Opp. to Sum. J. at 13. These claims were not timely raised in any of
 plaintiff's numerous pleadings and motions and need not be considered here. *See M/V*
American Queen v. San Diego Marine Const. Corp., 708 F.2d 1483, 1492 (9th Cir. 1983).

01 *Gamble*, 429 U.S. 97, 106 (1976)). To prevail on such a claim, plaintiff must show that the
02 alleged delay was “harmful” or that it led to further injury. *McGuckin v. Smith*, 974 F.2d 1050,
03 1060 (9th Cir. 1992), *overruled on other grounds by WMX Techs., Inc. v. Miller*, 104 F.3d
04 1133 (9th Cir. 1997) (en banc). However, negligent treatment or diagnosis does not violate
05 the Eighth Amendment. *Estelle*, 429 U.S. at 106; *Lopez*, 203 F.3d at 1131. A mere
06 disagreement with a treatment provider does not give rise to an Eighth Amendment claim. *See*
07 *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996).

08 Nurses Behner, Barber, Sinape, and Krzyzek are entitled to qualified immunity. Nurses
09 Behner and Barber have indicated that they had no direct or indirect role in plaintiff’s transfer
10 or treatment. Dkt. No. 96, Barber Decl. at ¶ 4; Dkt. No. 97, Behner Decl. at ¶ 2-4. No
11 records before the Court support a contrary conclusion. Accordingly, these claims should be
12 dismissed.

13 Nurse Sinape has indicated that she treated plaintiff for complaints relating to his vision
14 and determined that his eyeglass prescription was inadequate. Dkt. No. 92, Sinape Decl. at ¶
15 6. Because of his complaints regarding his vision, Nurse Sinape scheduled plaintiff for an eye
16 examination at Harborview. *Id.*; Gotcher Dep. at 175; Opp. to Sum. J. at Exs. 47-49.
17 Similarly, Nurse Krzyzk examined plaintiff for complaints regarding his finger, back, and
18 mental health, but she had no authority to transfer plaintiff to Harborview, and denies ever
19 making any promises that she would do so. Dkt. No. 93, Krzyzk Decl. at ¶ 4-7. Plaintiff’s
20 allegations notwithstanding, he has offered no evidence to rebut the foregoing declarations and
21 support his allegations that these nurses rendered inadequate care and interfered with, denied,
22 or otherwise violated his Eighth Amendment rights. Claims against Nurses Sinape and Kryzk
23 should therefore be dismissed.

24 G. The Claim Against Dr. Alonzo Plough Should be Dismissed.

25 Plaintiff argues that former Director of Seattle-King County Department of Public
26 Health, Dr. Alonzo Plough, knew about his injuries, but failed to order appropriate treatment

01 or adequately respond to his complaints. Complaint at ¶ 80-87. Dr. Plough, however, is
02 entitled to summary judgment because plaintiff has not shown that he participated in any
03 violation of his civil rights. In order to state a claim for relief under 42 U.S.C. § 1983, a
04 plaintiff must assert that he suffered a violation of rights protected by the Constitution or
05 created by federal statute, and that the violation was proximately caused by a person acting
06 under color of state or federal law. *See Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir.
07 1991); *see also WMX Technologies, Inc. v. Miller*, 197 F.3d 367, 372 (9th Cir. 1999) (en
08 banc). Section 1983 liability arises only upon a showing that defendants personally participated
09 in violating plaintiff's civil rights. Respondeat superior liability will not support § 1983 liability
10 unless plaintiff demonstrates that a supervisor participated in the violations, directed the
11 violations, or knew about the violations and did nothing to prevent them. *Taylor v. List*, 880
12 F.2d 1040, 1045 (9th Cir. 1989) (internal citation omitted); *see also Mabe v. San Bernardino*
13 *County Dep't of Pub. Soc. Serv.*, 237 F.3d 1101, 1109 (9th Cir. 2001).

14 The basis for Dr. Plough's motion for summary judgment is that during his tenure at
15 King County, he had no involvement in plaintiff's care. Mtn. for Sum. J. at 17. The defense
16 has submitted a declaration that indicates Dr. Plough "did not make decisions as to who would
17 or would not be referred to outside health care providers[.]" Dkt. No. 99, Werlech Decl. at
18 ¶ 4. There is no evidence that Dr. Plough ever knew of plaintiff's request for outside medical
19 care, that he promised such care would be provided, or that he thwarted the delivery of such
20 care. *Id.* Plaintiff admitted in his deposition that he had no direct contact with Dr. Plough and
21 that Dr. Plough never promised him anything. Gotcher Dep. at 190-93. Moreover, even if Dr.
22 Plough knew that plaintiff was seeking outside medical care, plaintiff has, at best, alleged that
23 Dr. Plough declined to order the transfer. This is insufficient. *See Jackson*, 90 F.3d at 332
24 (indicating that a difference of opinion as to proper course of treatment does not rise to the
25 level of deliberate indifference to serious medical needs). Finally, as discussed above, plaintiff
26 has adduced no evidence which suggests he actually had any serious medical needs. Plaintiff's

01 claim against Dr. Plough should therefore be dismissed.

02 H. The Claim Against Kenneth Ray Should be Dismissed.

03 Plaintiff argues that former Jail Director Kenneth Ray knew about his injuries, but failed
04 to respond to his grievances or order appropriate treatment. Complaint at ¶¶ 80-87. Mr. Ray,
05 however, was not employed by the Jail during the period at issue in this lawsuit. He was the
06 Director of King County Department of Juvenile and Adult Detention from August 26, 2004,
07 to January 28, 2005. Dkt. No. 100, Nelson Decl. at ¶¶ 2-3. Plaintiff's complaint concerns
08 events that allegedly occurred between January 21, 2004, and June 4, 2004. Gotcher Dep. at
09 42-43. Indeed, plaintiff conceded at his deposition that he thought such promises had been
10 made, but that he did not actually know that to be the case. Gotcher Dep. at 197-99. Claims
11 against Mr. Ray should be dismissed.

12 I. The Claim Against Dr. Ben Sanders Should be Dismissed.

13 Plaintiff argues that Dr. Ben Sanders violated his Eighth Amendment rights by
14 performing a perfunctory medical examination only and rendering insufficient care. Complaint
15 at ¶¶ 58-60; Second Amended Complaint. He seeks damages and an injunction that orders Dr.
16 Sanders to turn over his medical files and to recommend he be immediately transported to
17 Harborview for appropriate care. Second Amended Complaint. Dr. Sanders has moved for
18 summary judgment, arguing that he provided constitutionally proper care and that he is entitled
19 to qualified immunity. Mtn. for Sum. J. at 15-17.

20 Because plaintiff is suing Dr. Sanders in his official capacity and is seeking, among
21 other things, injunctive and declaratory relief, qualified immunity is not available to him.
22 *Hallstrom v. City of Garden City*, 991 F.2d 1473, 1482 (9th Cir. 1993); *see also Los Angeles*
23 *Police Protective League v. Gates*, 995 F.2d 1469, 1472 (9th Cir. 1993). Nevertheless,
24 plaintiff is entitled to summary judgment. A difference of opinion between an inmate and
25 doctor regarding a diagnosis or course of treatment does not rise to the level of "deliberate
26 indifference" for purposes of an Eighth Amendment violation. *Jackson*, 90 F.3d at 332. Even

negligence in diagnosing or treating an inmate's medical condition does not state an Eighth Amendment claim. *Lopez*, 203 F.3d at 1131.

Plaintiff can make no showing that Dr. Sanders's treatment was constitutionally deficient. Aside from plaintiff's unsupported allegations, no medical records or other evidence before the Court suggest Dr. Sanders's treatment and diagnosis were constitutionally deficient in any way.⁸ Rather, plaintiff's complaint essentially turns on his unsupported and subjective belief that Dr. Sanders's evaluation was somehow inadequate. Such conclusory and unfounded allegations fail as a matter of law and are insufficient to defeat Dr. Sanders's motion for summary judgment. *See T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Ass'n.*, 809 F.2d 626, 630-31 (9th Cir. 1987).

J. The Claim Against Barbara Hanson Should be Dismissed.

Plaintiff alleges that Barbara Hanson violated his Eighth Amendment rights by denying his requests to transfer him to Harborview in order to obtain the treatment he believed he "needed." Complaint at ¶¶ 73-79, 91-93. He also suggests Ms. Hanson should have supervised her staff better. *Id.* Defendant argues that she is entitled to summary judgment because plaintiff cannot show she provided constitutionally-inadequate medical care. Mtn. for Sum. J. at 15-17.

Plaintiff's claims against Ms. Hanson turn on her alleged failure to supervise Jail Health staff in a manner plaintiff believes would have ensured that he would be transferred to Harborview. However, respondeat superior liability will not support § 1983 liability unless plaintiff demonstrates that a supervisor participated in the violations, directed the violations, or knew about the violations and did nothing to prevent them. *Taylor*, 880 F.2d at 1045. Even if Ms. Hanson knew that plaintiff wanted outside care, he has, at best, argued only that he disagrees with Ms. Hanson's decision. He has not shown that he actually received

⁸Plaintiff has provided records that indicate he was scheduled for an appointment at Harborview in July 2004 to follow-up on an earlier eye exam, but these notes do not indicate Dr. Sanders's examination was inadequate. Resp. To Sum. J., Exs. 47-49.

01 constitutionally-deficient medical care. This claim therefore does not rise to the level of a
02 constitutional violation, *Jackson*, 90 F.3d at 332, and is insufficient to carry plaintiff's burden
03 on summary judgment. *See T.W. Electrical Service, Inc.*, 809 F.2d at 630.

04 K. The Claim Against Andrew Murphy Should be Dismissed.

05 Plaintiff alleges that Andrew Murphy failed to transfer him to Harborview and that he
06 lied to the King County Ombudsman about following-up with the request. Complaint at ¶ 69-
07 72. He apparently argues that defendant failed to send his medical grievances to the proper
08 parties. Gotcher Dep. at. 137-40. Defendant denies these allegations and has moved for
09 summary judgment.

10 In a declaration in support of summary judgment, Mr. Murphy has stated that he is an
11 HIV/AIDS social worker at the Jail and has "no direct or indirect role in providing health care
12 to inmates, except as their health care needs might relate to HIV/AIDS issues." Dkt. No. 98,
13 Murphy Decl. at ¶ 1. He has no role in responding to inmate grievances, nor any
14 responsibilities relating to the transfer of prisoners. *Id.* at ¶ 3. More to the point, he has
15 "never had any direct or indirect contact with plaintiff." *Id.* Plaintiff admitted in his deposition
16 that he never had any contact with Mr. Murphy. Gotcher Dep. at 136. Claims against
17 defendant Murphy should be dismissed.

18 L. The Claim Against Michael Velasquez Should be Dismissed.

19 Plaintiff alleges that Michael Velasquez failed to transfer him to Harborview and that he
20 lied to the King County Ombudsman about following-up with the request. Complaint at ¶ 69-
21 72. Like his claims against Mr. Murphy, plaintiff argues that Mr. Velasquez failed to send his
22 medical grievances to the proper parties. Gotcher Dep. at 137-40. Defendant denies these
23 allegations and has moved for summary judgment.

24 Mr. Velasquez is not liable by virtue of his supervisory role over other health staff
25 because, as discussed above, plaintiff has not produced evidence that any Jail health staff
26 violated his civil rights. Hence, Mr. Velasquez could not have known of such violation and

01 failed to act. *Taylor*, 880 F.2d at 1045. Even if plaintiff's constitutional medical rights had
02 been violated, Mr. Velasquez did not, as plaintiff alleges, ignore his requests for assistance. To
03 the contrary, Mr. Velasquez has indicated that he responded to a grievance from plaintiff on
04 May 30, 2004, and assured him that he had been scheduled for an appointment at Harborview.
05 Dkt. No. 95, Velasquez Decl. at ¶ 6, Attachs. He also informed the Ombudsman of the
06 pending appointment. *Id.* at ¶ 4. Despite his allegations against Mr. Velasquez to the contrary,
07 plaintiff has acknowledged knowing he had an appointment. Opp. to Sum. J. at Exs. 47-49.
08 Claims against Mr. Velasquez should therefore be dismissed.

09 M. Miscellaneous Motions.

10 In conjunction with defendants' motion for summary judgment, several other motions
11 relating to the motion have been filed by the parties.

12 Defendants have moved to strike certain materials submitted by plaintiff. Dkt. No. 115,
13 Reply in Support of Sum. J. at 2. Defendants were served with plaintiff's opposition to
14 summary judgment and supporting materials. At the same time, plaintiff submitted his
15 opposition and supporting materials to the Court. Because of the volume of documents
16 plaintiff submitted to the Court, the Clerk of the Court entered a docket entry that the items
17 were available at the Clerk's Office in paper format. Although most of these documents are
18 referred to in plaintiff's motions, they are misnumbered and extremely difficult to identify.
19 Defendants object to the Court considering any materials inconsistent with what they received.
20 Reply in Support of Sum. J. at 2. It does not appear that the documents on file with the
21 Clerk's Office are different from those served on the defendants, nor that this decision relies
22 upon any documents not submitted to defendants. Defendants' motion is DENIED.

23 Defendants have moved to strike documents plaintiff refers to as "King County
24 Ombudsman Case Report" because they are unsworn statements. Reply in Support of Sum. J.
25 at 2. This motion is GRANTED. This decision has not relied on those statements.

26 Defendants have moved to strike any new or additional claims raised by plaintiff for the

01 first time in his opposition to summary judgment. Reply in Support of Sum. J. at 4 n.2.
02 Defendants refer specifically to contentions raised in plaintiff's opposition to summary
03 judgment that defendants failed to follow proper procedures for filing reports. *Id.* Plaintiff's
04 papers have varied wildly in their descriptions of fact and articulation of legal claims. The
05 Court recognizes that plaintiff's papers have raised new and different issues at various later
06 stages of this matter. *See, e.g., infra* n.8. To the extent plaintiff has raised any such claims,
07 defendants' motion is GRANTED. This decision has not considered any issues not properly
08 raised in plaintiff's complaints.

09 Plaintiff has filed several "motions" since defendants' reply to his opposition to
10 summary judgment. *See, e.g.,* Dkt. Nos. 120-121, 125-127. Although they are unclear,
11 plaintiff appears to have attempted to supplement the record because he believed that the Court
12 did not receive his materials in support of summary judgment. The Court has indicated several
13 times that the materials were received. Dkt. Nos. 119, 122. These motions are DENIED.


14 Plaintiff has raised a variety of "objections" against defendants for allegedly filing
15 "malicious" and "frivolous" motions and for attempting to deceive the Court.⁹ Dkt. Nos. 125-
16 27. He has requested that the Court sanction defendants. These motions are without merit
17 and are DENIED. Plaintiff has expressed concern that the Court has considered testimony that
18 was previously ordered stricken. Plaintiff is advised that the testimony stricken by the Court's
19 June 22, 2005, order (Dkt. No. 70) has not been considered by the Court in this decision.

20 IV. CONCLUSION

21 For the reasons discussed above, the Court recommends that defendants' motion for
22 summary judgment should be granted as to all defendants but Sergeant Stewart. The Court
23 also recommends that plaintiff should be permitted to pursue his § 1983 claim against this
24 defendant, and counsel should be appointed for plaintiff in anticipation of trial.

25
26 ⁹Although plaintiff's writing style makes it difficult to determine the precise nature of
these "objections," most of them appear to consist of disagreements with defendants' legal
arguments and their characterization of the facts.

01 DATED this 13th day of January, 2006.

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04 JAMES P. DONOHUE
05 United States Magistrate Judge
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